UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X

FRAGRANCENET.COM, INC.,

Plaintiff,

-v-

FRAGRANCEX.COM, INC. and JOHN DOES 1-20,

Defendants.

---X

AFFIDAVIT OF JOY FALLEK

CV 06 2225 (JFB) (AKT)

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

JOY FALLEK, being duly sworn, deposes and says:

1. I am an associate of Moses & Singer LLP, counsel for Defendants. I make this affidavit in support of Defendant's opposition to Plaintiff's motion for a third amendment of its complaint. The purpose of this affidavit is to provide the Court with relevant documents and cases.

2. Annexed hereto as Exhibit A is a copy of data from the TARR webserver of the U.S. Patent and Trademark Office indicating that notice of final refusal of the mark FRAGRANCENET was mailed on April 19, 2000.

3. Annexed hereto as Exhibit B is a copy of data from the TARR webserver of the U.S. Patent and Trademark Office indicating that notice of final refusal of registration of the mark WWW.FRAGRANCENET.COM was mailed on February 5, 2001.

4. Annexed hereto as Exhibit C is a copy of Plaintiff's Trademark Application filed in the U.S. Patent and Trademark Office on September 19, 2005.

5. Annexed hereto as Exhibit D is a copy of the U.S. Patent and Trademark Office's Office Action filed in response to Plaintiff's September 19, 2005 application, dated May 4, 2006.

6. Annexed hereto as Exhibit E is a copy of the Plaintiff's Response to the U.S. Patent and Trademark Office's May 4, 2006 Office Action, dated November 6, 2006.

7. Annexed hereto as Exhibit F is a copy of the U.S. Patent and Trademark Office's Office Action filed in response to Plaintiff's November 6, 2006 Response, dated December 12, 2006.

8. Annexed hereto as Exhibit G is a copy of *Kremen v. Cohen*, 6 ILR (P&F) 755 (D.N.Cal. Nov. 27, 2000).

Joy Fallek
JOY FALLEK

Sworn before me this 18th day of
May, 2006

Don K. Kick
Notary Public

DON K. KICK
Notary Public, State of New York
No. 01KI6098644
Qualified in Nassau County
Commission Expires Sept. 15, 2007

EXHIBIT A

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-05-17 11:38:16 ET

Serial Number: 75579347 Assignment Information

Registration Number: (NOT AVAILABLE)

Mark (words only): FRAGRANCENET

Standard Character claim: No

Current Status: Abandoned-Failure To Respond Or Late Response

Date of Status: 2001-01-02

Filing Date: 1998-10-29

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 112

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2001-01-09

LAST APPLICANT(S)/OWNER(S) OF RECORD

---

1. TELESCENTS, INC.

Address:
TELESCENTS, INC.
2070 Deer Park Avenue
Deer Park, NY 11729
United States
Legal Entity Type: Corporation
State or Country of Incorporation: New York

GOODS AND/OR SERVICES

International Class: 035
Class Status: Active
computerized on-line search and ordering service featuring the wholesale and retail distribution of perfumes and fragrances
Basis: 1(a)
First Use Date: 1997-01-27

First Use in Commerce Date: 1997-01-27

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2001-01-02 - Abandonment - Failure To Respond Or Late Response

2000-05-09 - Assigned To Examiner

2000-04-19 - Final refusal mailed

2000-04-10 - Assigned To Examiner

2000-03-01 - Communication received from applicant

1999-08-27 - Non-final action mailed

1999-07-29 - Assigned To Examiner

1999-07-27 - Assigned To Examiner

1999-07-13 - Assigned To Examiner

1999-06-29 - Assigned To Examiner

1999-06-11 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record
John E. Ottaviani

Correspondent
JOHN E. OTTAVIANI
EDWARDS & ANGELL, LLP
2800 BANKBOSTON PLAZA
PROVIDENCE, RI 02903

EXHIBIT B

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2007-05-17 11:40:46 ET

Serial Number: 75579346 Assignment Information

Registration Number: (NOT AVAILABLE)

Mark (words only): WWW. FRAGRANCENET. COM

Standard Character claim: No

Current Status: Abandoned-Failure To Respond Or Late Response

Date of Status: 2001-09-28

Filing Date: 1998-10-29

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 113

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2002-08-05

LAST APPLICANT(S)/OWNER(S) OF RECORD

---

1. TELESCENTS, INC.

Address:
TELESCENTS, INC.
2070 Deer Park Avenue
Deer Park, NY 11729
United States
Legal Entity Type: Corporation
State or Country of Incorporation: New York

GOODS AND/OR SERVICES

International Class: 035
Class Status: Active
Selling brand name fragrances over the internet
Basis: 1(a)
First Use Date: 1997-01-27
First Use in Commerce Date: 1997-01-27

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2001-09-28 - Abandonment - Failure To Respond Or Late Response

2001-02-05 - Final refusal mailed

2000-10-11 - Assigned To Examiner

2000-10-05 - Petition To Revive-Granted

2000-04-10 - Petition To Revive-Received

2000-03-27 - Abandonment - Failure To Respond Or Late Response

2000-03-27 - Assigned To Examiner

1999-07-19 - Non-final action mailed

1999-06-29 - Assigned To Examiner

1999-06-11 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record
John E. Ottaviani

Correspondent
JOHN E. OTTAVIANI
EDWARDS & ANGELL, LLP
2800 BANKBOSTON PLAZA
PROVIDENCE, RI 02903

EXHIBIT C

PTO Form 1478 (Rev 6/2005)
OMB No. 0651-0009 (Exp xx/xx/xxxx)

Trademark/Service Mark Application, Principal Register

Serial Number: 78715464
Filing Date: 09/19/2005

The table below presents the data as entered.

Input Field	Entered
MARK SECTION	
MARK	FRAGRANCENET
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	FRAGRANCENET
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
OWNER SECTION	
NAME	Telescents, Inc.
STREET	104 Parkway Drive South
CITY	Hauppauge
STATE	New York
ZIP/POSTAL CODE	11788
COUNTRY	United States
AUTHORIZED EMAIL COMMUNICATION	No
LEGAL ENTITY SECTION	
TYPE	CORPORATION
STATE/COUNTRY OF INCORPORATION	New York
GOODS AND/OR SERVICES SECTION	
INTERNATIONAL CLASS	035
DESCRIPTION	On-line retail store services in the fields of perfumery, aromatherapy, candles and haircare preparations
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 01/27/1997
FIRST USE IN COMMERCE DATE	At least as early as 01/27/1997
SPECIMEN FILE NAME(S)	\\TICRS\EXPORT9\IMAGEOUT9 \787\154\78715464\xml1\AP P0003.JPG
	\\TICRS\EXPORT9\IMAGEOUT9 \787\154\78715464\xml1\AP P0004.JPG
SPECIMEN DESCRIPTION	Web site printout

SIGNATURE SECTION	
SIGNATURE	/Dennis M. Apfel/
SIGNATORY NAME	Dennis M. Apfel
SIGNATORY DATE	09/19/2005
SIGNATORY POSITION	Chairman/CEO
PAYMENT SECTION	
NUMBER OF CLASSES	1
NUMBER OF CLASSES PAID	1
SUBTOTAL AMOUNT	325
TOTAL AMOUNT	325
ATTORNEY	
NAME	Catherine M. Clayton
FIRM NAME	Paul, Hastings, Janofsky & Walker LLP
STREET	75 East 55th Street
CITY	New York
STATE	New York
ZIP/POSTAL CODE	10022
COUNTRY	United States
PHONE	212.318.6084
FAX	212.230.7781
EMAIL	rls@paulhastings.com
AUTHORIZED EMAIL COMMUNICATION	Yes
ATTORNEY DOCKET NUMBER	77777.77777
OTHER APPOINTED ATTORNEY(S)	Robert L. Sherman, Natalie Yellin
CORRESPONDENCE SECTION	
NAME	Catherine M. Clayton
FIRM NAME	Paul, Hastings, Janofsky & Walker LLP
STREET	75 East 55th Street
CITY	New York
STATE	New York
ZIP/POSTAL CODE	10022
COUNTRY	United States
PHONE	212.318.6084
FAX	212.230.7781
EMAIL	rls@paulhastings.com

AUTHORIZED EMAIL COMMUNICATION	Yes
FILING INFORMATION	
SUBMIT DATE	Mon Sep 19 11:59:04 EDT 2005
TEAS STAMP	USPTO/BAS-21624125030-200 50919115904502088-7871546 4-2002259f4a59babe9bd16ec 88f3a79d5-DA-1330-2005091 9113349535503

PTO Form 1478 (Rev 6/2005)
OMB No. 0651-0009 (Exp xx/xx/xxxx)

Trademark/Service Mark Application, Principal Register

Serial Number: 78715464
Filing Date: 09/19/2005

To the Commissioner for Trademarks:

MARK: (Standard Characters, see mark)
The mark consists of standard characters, without claim to any particular font, style, size, or color.
The literal element of the mark consists of FRAGRANCENET.
The applicant, Telescents, Inc., a corporation of New York, residing at 104 Parkway Drive South, Hauppauge, New York, United States, 11788, requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.
The applicant, or the applicant's related company or licensee, is using the mark in commerce, and lists below the dates of use by the applicant, or the applicant's related company, licensee, or predecessor in interest, of the mark on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended.
International Class 035: On-line retail store services in the fields of perfumery, aromatherapy, candles and haircare preparations
In International Class 035, the mark was first used at least as early as 01/27/1997, and first used in commerce at least as early as 01/27/1997, and is now in use in such commerce. The applicant is submitting or will submit one specimen for *each class* showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) Web site printout.
Specimen - 1
Specimen - 2
The applicant hereby appoints Catherine M. Clayton and Robert L. Sherman, Natalie Yellin of Paul, Hastings, Janofsky & Walker LLP, 75 East 55th Street, New York, New York, United States, 10022 to submit this application on behalf of the applicant. The attorney docket/reference number is 77777.77777.
The USPTO is authorized to communicate with the applicant or its representative at the following email address: rls@paulhastings.com.
A fee payment in the amount of $325 will be submitted with the application, representing payment for 1 class(es).

Declaration

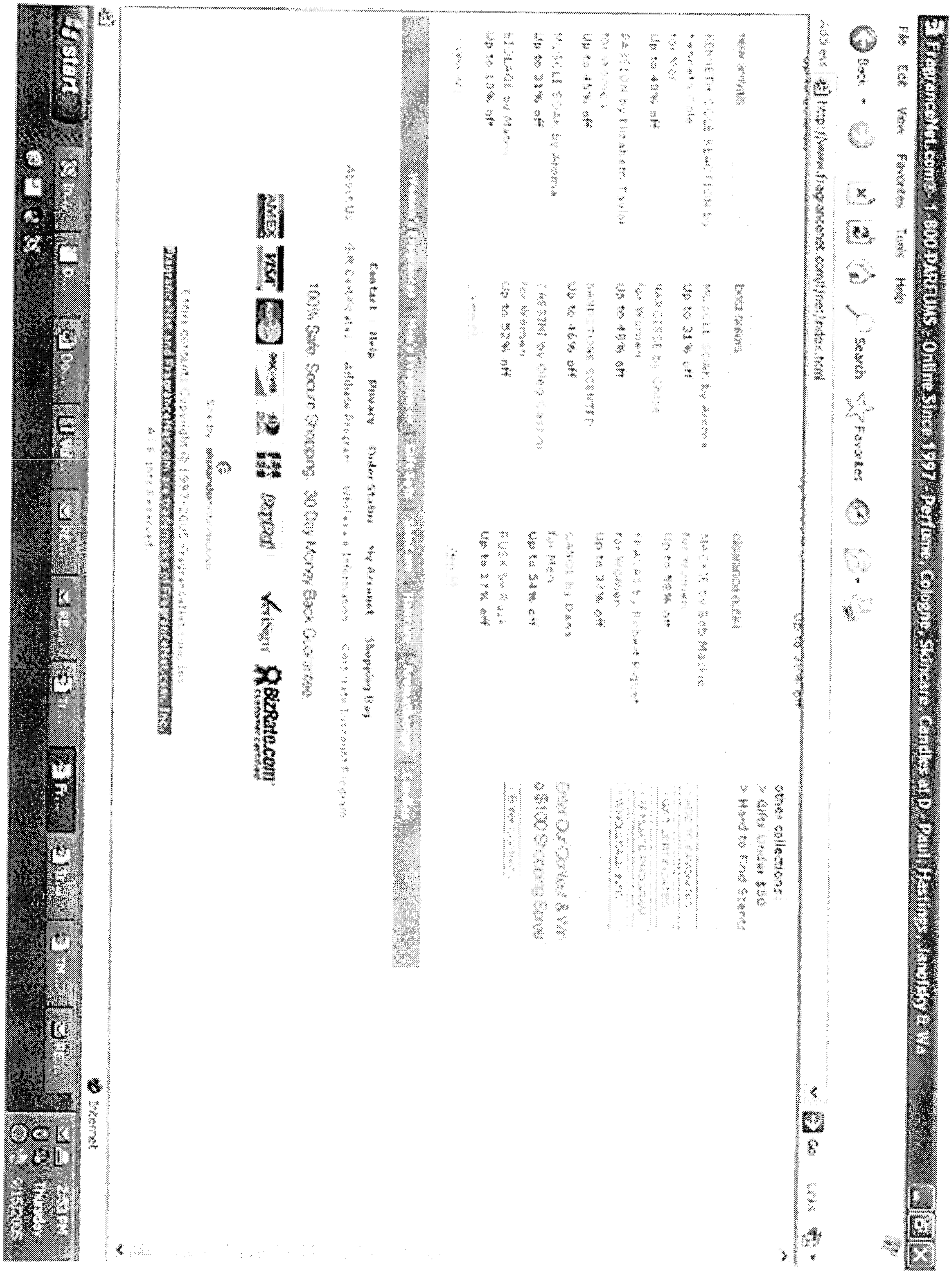
The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.
Signature: /Dennis M. Apfel/ Date: 09/19/2005
Signatory's Name: Dennis M. Apfel
Signatory's Position: Chairman/CEO
Mailing Address:

Catherine M. Clayton
75 East 55th Street
New York, New York 10022

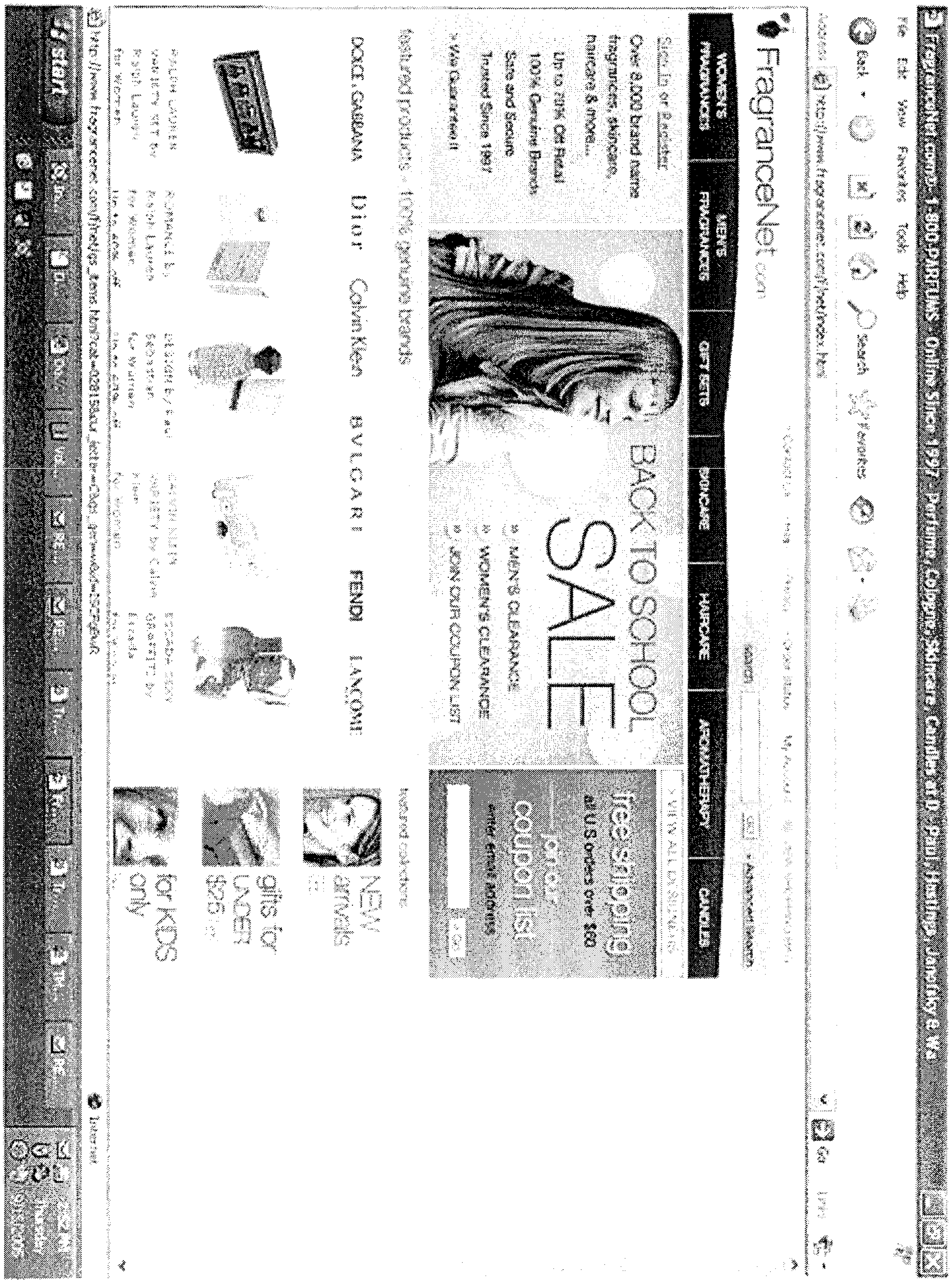
RAM Sale Number: 1330
RAM Accounting Date: 09/19/2005
Serial Number: 78715464
Internet Transmission Date: Mon Sep 19 11:59:04 EDT 2005
TEAS Stamp: USPTO/BAS-21624125030-20050919115904502088-78715464-2002259f4a59babe9bd16ec88f3a79d5-DA-1330-20050919113349535503

FRAGRANCENET

FragranceNet.com - 1-800-PARFUMS - Online Since 1997 - Perfume, Cologne, Skincare, Candles at D - Paul, Hastings, Janofsky & Wa
File Edit View Favorites Tools Help
FragranceNet.com
WOMEN'S FRAGRANCES
MEN'S FRAGRANCES
GIFT SETS
SKINCARE
HAIRCARE
AROMATHERAPY
CANDLES
Sign Up or Register
Over 8,000 brand name fragrances, skincare, haircare & more...
Up to 70% Off Retail
100% Genuine Brands
Safe and Secure
Trusted Since 1997
We Guarantee It
BACK TO SCHOOL
SALE
MEN'S CLEARANCE
WOMEN'S CLEARANCE
JOIN OUR COUPON LIST
free shipping
coupon list
featured products - 100% genuine brands
DOLCE GABBANA
Dior
Calvin Klein
BVLGARI
FENDI
LANCOME
featured collections
NEW arrivals
gifts for UNDER $25
for KIDS only
start


FragranceNet.com® - 1-800-PARFUMS - Online Since 1997 - Perfume, Cologne, Skincare, Candles at D - Paul, Hastings, Janofsky & Wa
File Edit View Favorites Tools Help
Back Search Favorites
http://www.fragrancenet.com/f/net/index.html
other collections:
> Gifts Under $50
> Hard to Find Scents
Up to 31% off
Up to 49% off
Up to 46% off
Up to 52% off
Up to 54% off
Up to 27% off
Contact Help Privacy Order Status My Account Shopping Bag
100% Safe Secure Shopping 30 Day Money Back Guarantee
AMEX VISA PayPal VeriSign BizRate.com
start
2:53 PM Thursday

FRAGRANCENET


FragranceNet.com
WOMEN'S FRAGRANCES
MEN'S FRAGRANCES
GIFT SETS
SKINCARE
HAIRCARE
AROMATHERAPY
CANDLES
Over 8,000 brand name fragrances, skincare, haircare & more...
Up to 70% Off Retail
100% Genuine Brands
Safe and Secure
Trusted Since 1997
We Guarantee It
BACK TO SCHOOL
SALE
MEN'S CLEARANCE
WOMEN'S CLEARANCE
JOIN OUR COUPON LIST
free shipping
all U.S. orders over $60
coupon list
featured products - 100% genuine brands
DOLCE & GABBANA
Dior
Calvin Klein
BVLGARI
FENDI
LANCOME
NEW arrivals
gifts for UNDER $25
for KIDS only

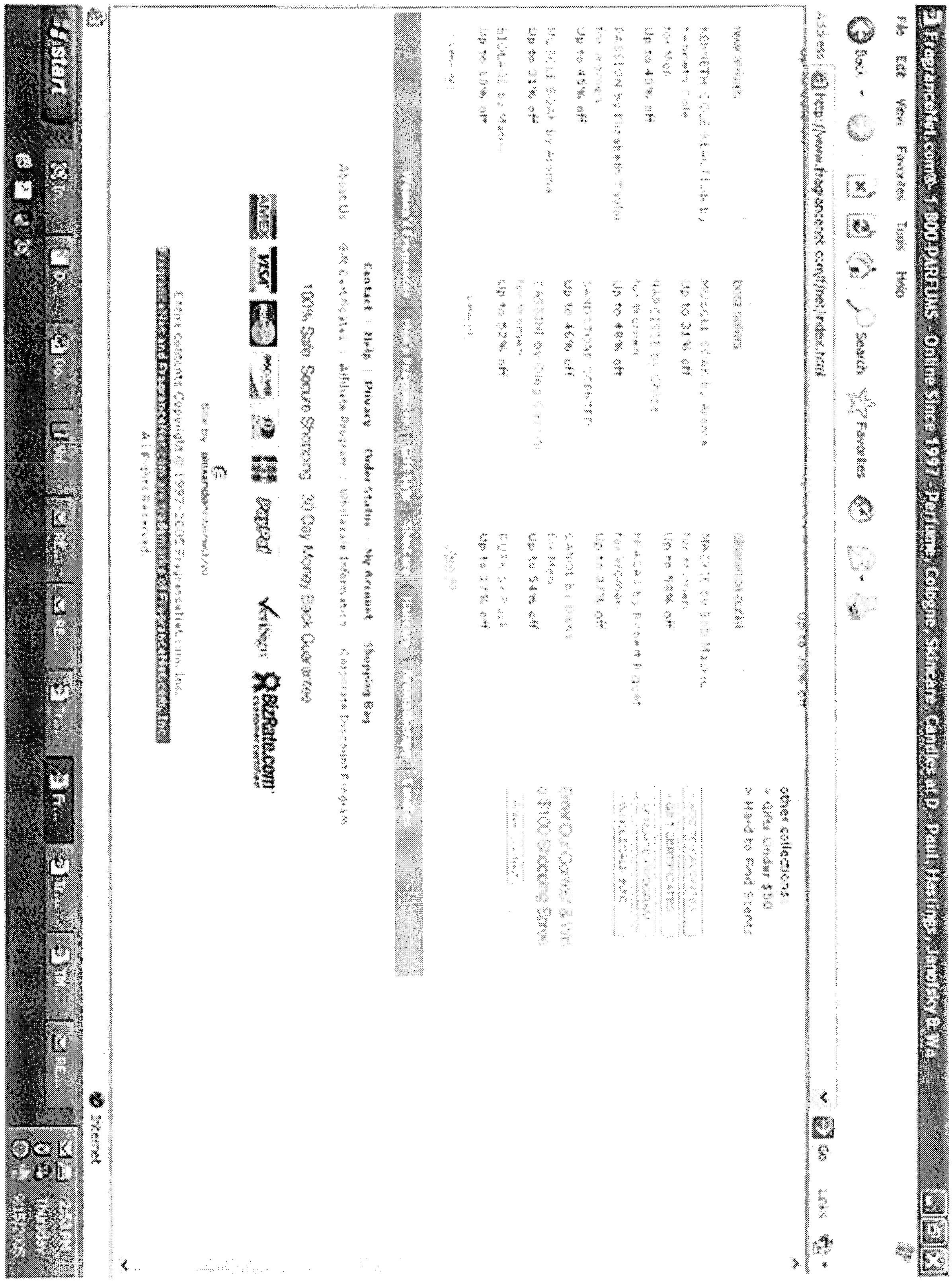

File Edit View Favorites Tools Help
100% Safe Secure Shopping 30 Day Money Back Guarantee
start
Internet

EXHIBIT D

To:	Telescents, Inc. (rls@paulhastings.com)
Subject:	TRADEMARK APPLICATION NO. 78715464 - FRAGRANCENET - 77777.77777
Sent:	5/4/2006 10:15:50 AM
Sent As:	ECOM115@USPTO.GOV
Attachments:	Attachment - 1 Attachment - 2 Attachment - 3

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/715464

APPLICANT: Telescents, Inc.

78715464

CORRESPONDENT ADDRESS:
CATHERINE M. CLAYTON
PAUL, HASTINGS, JANOFSKY & WALKER LLP
75 E 55TH ST FL C1
NEW YORK, NY 10022-3404

RETURN ADDRESS:
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: FRAGRANCENET

CORRESPONDENT'S REFERENCE/DOCKET NO: 77777.77777

CORRESPONDENT EMAIL ADDRESS:
rls@paulhastings.com

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

The assigned trademark examining attorney has reviewed the referenced application and has determined the following:

Search Results

The Office records have been searched and no similar registered or pending mark has been found that would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02.

Section 2(e)(1) - Descriptive Refusal

Registration is refused because the proposed mark merely describes a feature, function, use, benefit and or characteristic of the applicant's services. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1); TMEP §§1209 *et seq.*

A mark is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. 1052(e)(1), if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant goods and/or services. *In re Gyulay,* 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); In *re Bed & Breakfast Registry,* 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *In re MetPath Inc.,* 223 USPQ 88 (TTAB 1984); *In re Bright-Crest, Lid,* 204 USPQ 591 (TTAB 1979); TMEP section 1209.0 1(b).

It is not necessary that a term describe all of the purposes, functions, characteristics or features of the goods and/or services to be merely descriptive. It is enough if the term or terms describe one attribute of the goods and/or services. *In re H.UD.D.L.E.,* 216 USPQ 358 (TTAB 1982); *In re MBAssociates,* 180 USPQ 338 (TTAB 1973). Furthermore, one must consider a mark not in abstract, but in relation to services for which registration is sought, in the context in which designation is being used, and the possible significance that term would have to average prospective purchaser in determining whether designation is merely descriptive.

In this application the applicant has applied to register the mark FragranceNet. The mark is merely descriptive of the purpose, feature, function, use, benefit and/or characteristic of the services that are the subject of the application. Specifically, a computer based network featuring fragrances and/or a supply network featuring fragrances. The dictionary definitions of the word elements are instructive as to the descriptiveness of the mark and the definitions are attached hereto.

The proposed mark immediately informs the purchaser/user at least one feature, function, characteristic and/or the subject matter of the applicant's Entertainment services and online information services. As the applicant's mark indicates to potential purchasers a feature, function, characteristic, and/or subject matter of the applicant's goods and/or services, the mark is merely descriptive of those services, and registration is refused.

Response

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

Supplemental Register

Although the trademark examining attorney has refused registration on the Principal Register, applicant may respond to the stated refusal(s) under 2(e)(1) by amending the application to seek registration on the Supplemental Register. Trademark Act Section 23, 15 U.S.C. §1091; 37 C.F.R. §§2.47 and 2.75(a); TMEP §§801.02(b), 815 and 816 *et seq.*

Although Supplemental Register registration does not afford all the benefits of registration on the Principal Register, it does provide the following advantages:

- The registrant may use the registration symbol ®;
- The registration is protected against registration of a confusingly similar mark under §2(d) of the Trademark Act, 15 U.S.C. §1052(d);
- The registrant may bring suit for infringement in federal court; and
- The registration may serve as the basis for a filing in a foreign country under the Paris Convention and other international agreements.

How to Respond to this Office Action:

ONLINE RESPONSE: You may respond formally using the Office's Trademark Electronic Application System (TEAS) Response to Office Action form (visit http://www.uspto.gov/teas/index.html and follow the instructions, but if the Office Action issued via email you must wait 72 hours after receipt of the Office Action to respond via TEAS).

REGULAR MAIL RESPONSE: To respond by regular mail, your response should be sent to the mailing return address above and include the serial number, law office number and examining attorney's name in your response.

Mailing/E-mailing Date Information:

If the mailing or e-mailing date of this Office action does not appear above, this information can be obtained by visiting the USPTO website at http://tarr.uspto.gov/, inserting the application serial number, and viewing the prosecution history for the mailing date of the most recently issued Office communication.

Applicants, attorneys and other Trademark customers are strongly encouraged to correspond with the USPTO online via the Trademark Electronic Application System (TEAS), at:

http://www.uspto.gov/teas/index.html.

Copies of Documents

The applicant may view and download any or all documents contained in the electronic file wrapper of all pending trademark applications, as well as many registrations via the Trademark Document Retrieval (TDR) system available online at the following site:

http://portal.uspto.gov/external/portal/tow.

Currently, applicant's can access all pending applications and all Madrid Protocol filings, as well as many valid registrations, via TDR. The USPTO is in the process of converting all remaining registrations into digital format, to permit future TDR access. This conversion process is expected to take several years.

New TEAS Plus Filing System

On July 18, 2005, the USPTO introduced a new version of the application for a Trademark/Service mark, Principal Register. The TEAS Plus form features a lower filing fee of $275 per class of goods and/or services (the TEAS form fee is $325 per class of goods and/or services), but has stricter filing requirements than the regular TEAS form. Applicants are encouraged to read more about this new alternative filing program at the following site:

http://www.uspto.gov/teas/eTEASupcoming.html#TEASPlus.

Status of Application:

To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at the following site:

http://tarr.uspto.gov.

General Trademark Information:

For general information about trademarks, please visit the Office's website at:

http://www.uspto.gov/main/trademarks.htm

For inquiries or questions about this office action, please contact the assigned examining attorney.

/JSD/

Jeffrey S. DeFord

Examining Attorney

United States Patent & Trademark Office

Law Office 115

(571) 272-9469

Dictionary.com network Search
Dictionary Thesaurus Encyclopedia Web
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Network Architecture
Model any network environment. Simulate latency, bandwidth & more.

Huge In-Stock Inventory
Ship Today, ISO Certified We Schedule Obsoletes

Enterprise Networks
Phone, Email & wireless Solutions. Enterprise Networks From Siemens.

Muni Wireless Guide
About municipal wireless networks for broadband & 4.9GHz services

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Dictionary - Thesaurus - Encyclopedia - Web

Top Web Results for "network"

6 entries found for *network*.

net·work Pronunciation Key (nĕt'wûrk')
n.

1. An openwork fabric or structure in which cords, threads, or wires cross at regular intervals.
2. Something resembling an openwork fabric or structure in form or concept, especially:
   a. A system of lines or channels that cross or interconnect: *a network of railroads.*
   b. A complex, interconnected group or system: *an espionage network.*
   c. An extended group of people with similar interests or concerns who interact and remain in informal contact for mutual assistance or support.
3.
   a. A chain of radio or television broadcasting stations linked by wire or microwave relay.
   b. A company that produces the programs for these stations.
4.
   a. A group or system of electric components and connecting circuitry designed to function in a specific manner.
   b. *Computer Science.* A system of computers interconnected by telephone wires or other means in order to share information. Also called **net**[2].

v. **net·worked, net·work·ing, net·works**
v. tr.

1. To cover with or as if with an openwork fabric or structure.
2. To broadcast over a radio or television network.
3. *Computer Science.* To connect (computers) into a network.

v. intr.

To interact or engage in informal communication with others for mutual assistance or support.

net'work'er *n.*

[Download Now or Buy the Book]
Source: *The American Heritage® Dictionary of the English Language, Fourth Edition*
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Published by Houghton Mifflin Company. All rights reserved.

Ads by Google

Wireless Mesh Network
Instant Wireless Mesh Backhaul for any Access Point or Ethernet Device

Converged Networks
Siemens IP & Convergence Platforms Secure, Expandable & Cost Effective

Wireless Network
Meshed / Wi-Fi Designed to fit your needs

City wide Wi-Fi Mesh
No degradation over many hops. Modular approach 2.3.4 radios

Voice Data Convergence
Fully Integrated Voice/DSL Packages With No Start Up Costs.

Related ads:

- Ethernet Network
- ATM Network
- Enterprise Network
- Setup a Wireless Network
- Gigabit Network Card

net·work (nĕt'wûrk')
n.

1. A fabric or structure in which cords, threads, or wires cross at regular intervals.
2. A body structure resembling such a fabric or structure.

Source: *The American Heritage® Stedman's Medical Dictionary*
Copyright © 2002, 2001, 1995 by Houghton Mifflin Company. Published by Houghton Mifflin Company.

Main Entry: **net·work**
Pronunciation: 'net-"w&rk
Function: *noun*
1 : a fabric or structure of cords or wires that cross at regular intervals and are knotted or secured at the crossings
2 : a system of lines or channels resembling a network <a *network* of veins>

Source: *Merriam-Webster's Medical Dictionary, © 2002 Merriam-Webster, Inc.*

network

n 1: an interconnected system of things or people; "he owned a network of shops"; "retirement meant dropping out of a whole network of people who had been part of my life"; "tangled in a web of cloth" [syn: web] 2: (broadcasting) a communication system consisting of a group of broadcasting stations that all transmit the same programs; "the networks compete to broadcast important sports events" 3: an open fabric of string or rope or wire woven together at regular intervals [syn: net, mesh, meshing, meshwork] 4: a system of intersecting lines or channels; "a railroad network"; "a network of canals" 5: (electronics) a system of interconnected electronic components or circuits [syn: electronic network] v : communicate with and within a group; "You have to network if you want to get a good job"

Source: *WordNet ® 2.0, © 2003 Princeton University*

network

<networking> Hardware and software data communication systems

The OSI seven layer model attempts to provide a way of partitioning any computer network into independent modules from the lowest (physical) layer to the highest (application) layer. Many different specifications exist at each of these layers.

Networks are often also classified according to their geographical extent: local area network (LAN), metropolitan area network (MAN), wide area network (WAN) and also according to the protocols used

See BITNET, Ethernet, Internet, Novell, PSTN, network, the.

[Tanenbaum, A., "Computer Networks, 2nd ed.", Prentice Hall, Englewood Cliffs, NJ, 1989.]

(1995-03-10)

Source: *The Free On-line Dictionary of Computing, © 1993-2005 Denis Howe.*

network

network, in CancerWEB's On-line Medical Dictionary

Source: *On-line Medical Dictionary, © 1997-98 Academic Medical Publishing & CancerWEB.*

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fragrance [Search]

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Top Web Results for "fragrance"

2 entries found for *fragrance*.

fra·grance Pronunciation Key (frā′grəns)
n.

1. The state or quality of having a pleasant odor.
2. A sweet or pleasant odor; a scent.
3. A substance, such as a perfume or cologne, designed to emit a pleasant odor.

Synonyms: *fragrance, aroma, bouquet, perfume, redolence, scent*
These nouns denote a pleasant or sweet odor: *the fragrance of lilacs; the aroma of sizzling bacon; the bouquet of a fine wine; the perfume of roses; the redolence of fresh coffee; the scent of newly mown hay.*

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Source: *The American Heritage® Dictionary of the English Language, Fourth Edition*
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fragrance

n 1: a distinctive odor that is pleasant [syn: aroma, perfume, scent] 2: a pleasingly sweet olfactory property [syn: bouquet, redolence, sweetness]

Source: *WordNet ® 2.0, © 2003 Princeton University.*

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#	Total Marks	Dead Marks	Live Viewed Docs	Live Viewed Images	Status/ Search Duration	Search
01	772	N/A	0	0	0:01	*fragran*[bi,ti]
02	56281	N/A	0	0	0:01	*net*[bi,ti]
03	8	7	1	1	0:01	1 and 2
04	1377851	N/A	0	0	0:02	"035"[cc]
05	351841	N/A	0	0	0:02	("035" or a or b or "200")[ic]
06	112	N/A	0	0	0:01	1 and 4
07	63	40	23	14	0:01	1 and 5
08	35963	N/A	0	0	0:02	2 and 4
09	9762	N/A	0	0	0:01	2 and 5
10	0	0	0	0	0:01	*phr{v}ngr{v}nc*[bi,ti]
11	4	2	2	2	0:02	*fr{v}ngr{v}nc*[bi,ti]
12	619	N/A	0	0	0:01	*fr{v}gr{v}nc*[bi,ti]
13	0	0	0	0	0:01	*ph{v}gr{v}nc*[bi,ti]
14	0	0	0	0	0:01	12 not 1

Session started 3/28/2006 4:10:52 PM
Session finished 3/28/2006 4:18:59 PM
Total search duration 0 minutes 18 seconds
Session duration 8 minutes 7 seconds
Defaut NEAR limit=1ADJ limit=1
Sent to TICRS as Serial Number: 78715464

EXHIBIT E

PTO Form 1957 (Rev 9/2005)
OMB No. 0651-0050 (Exp. 04/2009)

Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	78715464
LAW OFFICE ASSIGNED	LAW OFFICE 115
MARK SECTION (no change)	
ADDITIONAL STATEMENTS SECTION	
SECTION 2(f)	"The mark has become distinctive of the goods/services through the applicant's substantially exclusive and continuous use in commerce for at least the five years immediately before the date of this statement."
SIGNATURE SECTION	
DECLARATION SIGNATURE	/cmc/
SIGNATORY'S NAME	Catherine M. Clayton
SIGNATORY'S POSITION	Attorney for Applicant
DATE SIGNED	11/06/2006
RESPONSE SIGNATURE	/cmc/
SIGNATORY'S NAME	Catherine M. Clayton
SIGNATORY'S POSITION	Attorney for Applicant
DATE SIGNED	11/06/2006
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Mon Nov 06 15:57:47 EST 2006
TEAS STAMP	USPTO/ROA-216.241.250.30-20061106155747684238-78715464-340e1ea4399ea70ae1be213126be65251da-N/A-N/A-20061106155637902143

PTO Form 1957 (Rev 9/2005)
OMB No. 0651-0050 (Exp. 04/2009)

Response to Office Action

To the Commissioner for Trademarks:

Application serial no. **78715464** has been amended as follows:

Additional Statements

"The mark has become distinctive of the goods/services through the applicant's substantially exclusive and continuous use in commerce for at least the five years immediately before the date of this statement."

Declaration Signature

If the applicant is seeking registration under Section 1(b) and/or Section 44 of the Trademark Act, the applicant had a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. 37 C.F.R. Secs. 2.34(a)(2)(i); 2.34 (a)(3)(i); and 2.34(a)(4)(ii). If the applicant is seeking registration under Section 1(a) of the Trademark Act, the mark was in use in commerce on or in connection with the goods or services listed in the application as of the application filing date. 37 C.F.R. Secs. 2.34(a)(1)(i). The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. §1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; that if the original application was submitted unsigned, that all statements in the original application and this submission made of the declaration signer's knowledge are true; and all statements in the original application and this submission made on information and belief are believed to be true.
Signature: /cmc/ Date: 11/06/2006
Signatory's Name: Catherine M. Clayton
Signatory's Position: Attorney for Applicant

Response Signature
Signature: /cmc/ Date: 11/06/2006
Signatory's Name: Catherine M. Clayton
Signatory's Position: Attorney for Applicant

Serial Number: 78715464
Internet Transmission Date: Mon Nov 06 15:57:47 EST 2006
TEAS Stamp: USPTO/ROA-216.241.250.30-200611061557476
84238-78715464-340e1ea4399ea70ae1be21312
6be65251da-N/A-N/A-20061106155637902143

EXHIBIT F

To: Telescents, Inc. (rls@paulhastings.com)

Subject: TRADEMARK APPLICATION NO. 78715464 - FRAGRANCENET - 77777.77777

Sent: 12/12/2006 4:39:17 PM

Sent As: ECOM115@USPTO.GOV

Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/715464

APPLICANT: Telescents, Inc.

78715464

CORRESPONDENT ADDRESS:
CATHERINE M. CLAYTON
PAUL, HASTINGS, JANOFSKY & WALKER LLP
75 E 55TH ST FL C1
NEW YORK, NY 10022-3404

RETURN ADDRESS:
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: FRAGRANCENET

CORRESPONDENT'S REFERENCE/DOCKET NO: 77777.77777

CORRESPONDENT EMAIL ADDRESS:
rls@paulhastings.com

Please provide in all correspondence:

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2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

This Office action responds to the applicant's correspondence of November 8, 2006. In its response the applicant made a claim of acquired distinctiveness under Section 2(f). The examining attorney has considered the claim but it is insufficient. Because this is a new issue the refusal under section 2(e)(1) is continued and a new refusal issued as to the sufficiency of the 2(f) claim.

Acquired Distinctiveness

Applicant has asserted acquired distinctiveness based on five years' use in commerce. However, because the applied-for mark is highly descriptive of applicant's goods and/or services, the allegation of five years' use is insufficient to show acquired distinctiveness. *In re Kalmbach Publ'g Co.*, 14 USPQ2d 1490 (TTAB 1989); TMEP §1212.05(a). Additional evidence is needed.

This evidence may include specific dollar sales under the mark, advertising figures, samples of advertising, consumer or dealer statements of recognition of the mark, and any other evidence that establishes the distinctiveness of the mark as an indicator of source. The Office will decide each case on its own merits.

If additional evidence is submitted, the following factors are generally considered: (1) length and exclusivity of use by applicant of the mark in the United States; (2) the type, expense and amount of advertising of the mark in the United States; and (3) applicant's efforts, such as unsolicited media coverage and consumer studies, in the United States to associate the mark with the source of the goods and/or services identified in the application. *In re Steelbuilding.com*, 415 F.3d 1293, 1300, 75 U.S.P.Q.2d 1420, 1424 (Fed. Cir. 2005). A showing of acquired distinctiveness need not consider each of these factors, and no single factor is determinative. *Id.*; *see* 37 C.F.R. §2.41; TMEP §§1212 *et seq.*

The amount and character of evidence needed to establish acquired distinctiveness depends on the facts of each case and particularly on the nature of the mark sought to be registered. *See Roux Laboratories, Inc. v. Clairol Inc.,* 427 F.2d 823, 166 USPQ 34 (C.C.P.A. 1970); *In re Hehr Mfg. Co.*, 279 F.2d 526, 126 USPQ 381 (C.C.P.A. 1960); *In re Gammon Reel, Inc.,* 227 USPQ 729 (TTAB 1985). More evidence is needed where a mark is so highly descriptive that purchasers seeing the matter in relation to the named goods and/or services would be less likely to believe that it indicates source in any one party. *See, e.g., In re Bongrain International Corp.,* 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990); *In re Seaman & Associates, Inc.*, 1 USPQ2d 1657 (TTAB 1986); *In re Packaging Specialists, Inc.,* 221 USPQ 917 (TTAB 1984). However, no amount of purported proof that a generic term has acquired secondary meaning can transform that term into a registrable trademark. Such a designation cannot become a trademark under any circumstances. *See Miller Brewing Co. v. G. Heileman Brewing Co.,* 561 F.2d 75, 195 USPQ 281 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025, 196 USPQ 592 (1978).

Response

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

How to Respond to this Office Action:

ONLINE RESPONSE: You may respond formally using the Office's Trademark Electronic Application System (TEAS) Response to Office Action form (visit http://www.uspto.gov/teas/index.html and follow the instructions, but if the Office Action issued via email you must wait 72 hours after receipt of the Office Action to respond via TEAS).

REGULAR MAIL RESPONSE: To respond by regular mail, your response should be sent to the mailing return address above and include the serial number, law office number and examining attorney's name in your response.

Mailing/E-mailing Date Information:

If the mailing or e-mailing date of this Office action does not appear above, this information can be obtained by visiting the USPTO website at http://tarr.uspto.gov/, inserting the application serial number, and viewing the prosecution history for the mailing date of the most recently issued Office communication.

Applicants, attorneys and other Trademark customers are strongly encouraged to correspond with the USPTO online via the Trademark Electronic Application System (TEAS), at:

http://www.uspto.gov/teas/index.html.

Copies of Documents

The applicant may view and download any or all documents contained in the electronic file wrapper of all pending trademark applications, as well as many registrations via the Trademark Document Retrieval (TDR) system available online at the following site:

http://portal.uspto.gov/external/portal/tow.

Currently, applicant's can access all pending applications and all Madrid Protocol filings, as well as many valid registrations, via TDR. The USPTO is in the process of converting all remaining registrations into digital format, to permit future TDR access. This conversion process is expected to take several years.

New TEAS Plus Filing System

On July 18, 2005, the USPTO introduced a new version of the application for a Trademark/Service mark, Principal Register. The TEAS Plus form features a lower filing fee of $275 per class of goods and/or services (the TEAS form fee is $325 per class of goods and/or services), but has stricter filing requirements than the regular TEAS form. Applicants are encouraged to read more about this new alternative filing program at the following site:

http://www.uspto.gov/teas/eTEASupcoming.html#TEASPlus.

Status of Application:

To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at the following site:

http://tarr.uspto.gov.

General Trademark Information:

For general information about trademarks, please visit the Office's website at:

http://www.uspto.gov/main/trademarks.htm

For inquiries or questions about this office action, please contact the assigned examining attorney.

/JSD/

Jeffrey S. DeFord

Examining Attorney

United States Patent & Trademark Office

Law Office 115

(571) 272-9469

EXHIBIT G

these Lanham Act Violations may result in the irreparable harm of lost client relationships.

Accordingly, the Court enjoins Verio from any future use in its e-mail, direct mail, or telephone solicitations of the marks Register.com or "first step on the web" or any similar mark. Furthermore, the Court enjoins Verio from indicating in any affirmative way that it is calling regarding the registration of the customer's domain name, rather than in regard to the provision of web-hosting or other services related to the domain name.

V. Injunction

For the foregoing reasons and pursuant to Fed.R.Civ.P. 65, it is hereby ORDERED, that pending a final decision on the merits of plaintiff's claims, defendant Verio Inc., its officers, agents, servants, employees, successors and assigns, all persons acting in concert or participation with Verio, and/or acting on its behalf or at its direction (collectively, "Verio"), are enjoined from engaging in the following activities:

1. Using or causing to be used the "Register.com" mark or the "first step on the web" mark or any other designation similar thereto, on or in connection with the advertising, marketing, or promotion of Verio and/or any of Verio's services;

2. Representing, or committing any act which is calculated to or is likely to cause third parties to believe that Verio and/or Verio's services are sponsored by, or have the endorsement or approval of Register.com;

3. Accessing Register.com's computers and computer networks in any manner, including, but not limited to, by software programs performing multiple, automated, successive queries, provided that nothing in this Order shall prohibit Verio from accessing Register.com's WHOIS database in accordance with the terms and conditions thereof; and

4. Using any data currently in Verio's possession, custody or control, that using its best efforts, Verio can identify as having been obtained from Register.com's computers and computer networks to enable the transmission of unsolicited commercial electronic mail, telephone calls, or direct mail to the individuals listed in said data, provided that nothing in this Order shall prohibit Verio from (i) communicating with any of its existing customers, (ii) responding to communications received from any Register.com customer initially contacted before August 4, 2000, or (iii) communicating with any Register.com customer whose contact information is obtained by Verio from any source other than Register.com's computers and computer networks.

VI. Bond

Pursuant to Fed.R.Civ.P. 65(c), plaintiff is ordered to provide security in the amount of $250,000.

SO ORDERED

Kremen v. Cohen (Order Granting Summary Adjudication)

United States District Court, Northern District of California

November 27, 2000

6 ILR (P&F) 755

No. C 98-20718 JW

IC 11 — Forged transfer document renders purported domain name transfer void.

Plaintiff's motion to have the domain "sex.com" restored in plaintiff's name is granted because defendant used a forged letter from plaintiff's associate as the sole basis to effect the transfer of the name to defendant. The forged letter renders the transfer void *ab initio* and a complete nullity. The domain name is a form of intangible personal property, and the proper remedy for an invalid transfer of such property is to restore the parties to the position that they were in before the transfer. Further, the mere fact that plaintiff registered the name under his fictitious business entity alias does not change plaintiff's status as the rightful owner of the domain. The business is a fiction, and so too is any implication that the business is a legal entity separate from its owner that could have any ownership interest in the domain name. — **Kremen v. Cohen (Order Granting Summary Adjudication), 6 ILR (P&F) 755 [ND Cal, 2000].**

IP 2.4 — Generic domain name not entitled to trademark protection.

The domain name "sex.com" is a generic term that does not qualify for trademark protection. Defendants claim that plaintiff, who asserts a prior claim to ownership of the domain name, cannot use the name because defendants have trademark rights in the name. The ".com" suffix is not a relevant part of a claimed trademark because it is a generic locator for domain name web sites dedicated to commercial use and cannot be used to create a valid trademark for a second-level domain name ("sex") that is a generic term. Under the Ninth Circuit's "who-are-you/what-are-you" test, a term is generic if it

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fails to answer the question "Who are you?" Neither "sex" nor "sex.com" reveal anything about who runs the web site <sex.com>, where it comes from, or who vouches for it. Further, such a weak descriptive mark could be a valid trademark only with a strong showing of acquired secondary meaning. Defendants, however, are unable to show that a substantial number of sex.com's customers or potential customers associate the term with the services provided by defendants. — **Kremen v. Cohen (Order Granting Summary Adjudication), 6 ILR (P&F) 755 [ND Cal, 2000].**

Counsel: *Charles Carreon,* Law Office of Charles Carreon, 814 East Jackson St., Suite C, Medford, Oregon 97504; *Robert Selvidge,* 819 Eddy Street, San Francisco, CA 94109; *Robert S. Dorband,* Duboff Dorband Cushing & King, Hampton Oaks, Second Floor, 6665 Southwest Hampton Street, Portland, Oregon 97223; *James M. Wagstaffe, Pamela Urueta,* Kerr & Wagstaffe, 100 Spear St., Suite 1800, San Francisco, CA 94105-1528; *Richard S. Diestel, Alison M. Fee,* Bledsoe, Cathcart, Diestel & Pedersen, LLP, 601 California Street, 16th Floor, San Francisco, CA 94108.

ORDER GRANTING MOTION FOR SUMMARY ADJUDICATION

I. INTRODUCTION

JAMES WARE, U.S. District Judge. Plaintiff Gary Kremen ("Kremen") moves for summary adjudication of his claims for declaratory relief and Defendants' claims and defenses for trademark infringement. Defendants oppose the motion. The Court has read the moving and responding papers and has considered the oral arguments of counsel presented on Monday, November 27, 2000. For the reasons set forth below, the motion is granted.

II. BACKGROUND

For the sake of brevity, the Court will not recite all the allegations in the operative complaint.[1] The lawsuit arises out of Defendants' alleged misappropriation of the internet domain name, "sex.com." It is undisputed that Plaintiff registered "sex.com" with Network Solutions, Inc. ("NSI"),[2] under the fictitious business name Online Classified Inc. (OCI) on May 9, 1994. (Kremen Declaration, ¶5.) Kremen in his NSI registration from listed OCI as the registering organization and himself as the administrative, technical, and zone contact. (*Id.*; *see also*, Kremen Decl., Ex. B.)[3] It is also undisputed that through his dba OCI, Kremen was the first to register the domain name "sex.com" with NSI, (Kremen Decl. ¶¶7, 6; *see also* Kremen Decl. Ex. C.)

In October 1995, Defendant Stephen Cohen ("Cohen") sent a letter to NSI where "Sharon Dimmick," the supposed President of OCI, agreed to transfer its rights to the "sex.com" domain name to Cohen. The October 15, 1995 letter ("Dimmick letter") states that Sharon Dimmick is the president of OCI, that Kremen had been fired from OCI, and that Dimmick and Cohen had "numerous conversations." (Wagstaffe Decl. Ex. A.) The letter allows Cohen to use the "sex.com" domain name and permits him to personally notify NSI of her company's authorized transfer of the name to Cohen's corporation because OCI (a company dedicated to internet service) did not have access to an Internet connection. (*Id.*) After submitting this letter to NSI, Cohen sent e-mails to NSI to effectuate the transfer of the domain name "sex.com." (Wagstaffe Decl., Ex. B, E-mail from Cohen to NSI.)[4] Consequently, NSI transferred the domain name registration for "sex.com" to Stephen Cohen and his company.

Sharyn Dimmick was Kremen's housemate in October 1995. It is undisputed that she did not sign or have anything to do with the Dimmick letter. Defendants offer no contrary admissible evidence.[5] Ms. Dimmick submitted an affidavit confirming that she had no involvement with creating or authorizing the letter, was unaware of its contents, and had never met or heard of Cohen. (Wagstaffe Decl. Ex. D, Affidavit of Sharyn Dimmick.) At her deposition, Dimmick verified the statements in her affidavit and again confirmed that she never signed the Dimmick letter. (Wagstaffe Decl. Ex. C, Deposition of Sharyn Dimmick.) She further confirmed that she had no knowledge of, or involvement in, Online Classifieds, Inc., nor did she have any knowledge of, or involvement with, the domain name "sex.com." Indeed, Dimmick had no authority to act on behalf of OCI, a company of which she had no knowledge and with which she had no involvement. Dimmick and Cohen both testified that they had never spoken to each other, (Wagstaffe Decl. Ex. C & Ex. E, Cohen Deposition at 179.22-27), and therefore, the first line of the Dimmick letter describing "numerous conversations" between Cohen and Dimmick was knowingly false. In fact, Ms. Dimmick's first name is misspelled in the letter. She goes by the name "Sharyn" and not "Sharon." (Wagstaffe Decl. Ex. C, Deposition of Sharon Dimmick.)

---

[1] This case has already gone through an inordinate amount of motion practice, and the parties are more than familiar with the allegations in the Complaint.

[2] Kremen actually registered the domain name with Internic, a domain-name registering organization which subsequently became part of Network Solutions, Inc. For a thorough discussion of the registration process during the period at issue here, *see Oppedahl & Larson v. Network Solutions, Inc.*, 3 F Supp 2d 1147, 1149-50 *[2 ILR (P&F) 651]* (D Colo. 1998).

[3] The administrative contact is the contact for administrative and policy questions about the domain name. The technical contact is the contact point for problems with the domain name and for updating information about the name. The zone contact is the contact point for problems with the computer server that hosts the domain name.

[4] Cohen's e-mail to NSI left Kremen as the contact but placed his own e-mail address and telephone number as the contact information.

[5] The only evidence Cohen offers, which remotely contradicts such a conclusion, is that the Dimmick letter was signed at OCI's mailing address and that Cohen believed that the Dimmick letter was signed by Dimmick because "Mr. Franco went up to the apartment and returned with the signed letter." (Cohen Declaration in Support of Opposition to Plaintiff's Motion for Summary Judgment, ¶10.) Further, Cohen asserts that be believed he was dealing with a legitimate representative of OCI, and even paid that person $1000. (*Id.*). However, there is no admissible evidence which shows that Franco met Dimmick or someone purporting to be Dimmick or that Dimmick signed the October 15, 2000 letter, or that $1000 was paid to her.

Moreover, Cohen admitted that he was involved in the drafting of the Dimmick letter. Cohen admits that he and Vito Franco ("Franco"), who is now deceased, generated the stationery and letterhead on their own, although neither man had any connection to Online Classifieds, Inc. [Wagstaffe Decl., Ex. E (Cohen Depo. At 174:23-28); Wagstaffe Decl., Ex. F (Cohen Responses to Requests for Admissions, June 30, 2000.)] Cohen also admits Franco typed the text of the Dimmick letter at Cohen's request. [Wagstaffe Declaration, Ex. E (Cohen Depo. At 174:12-17, 5:20, 177:18-19), Ex. F (Cohen Admissions, Nos. 4-5.)] Cohen asserts that he allegedly paid (through Franco) Ms. Dimmick or someone purporting to be Ms. Dimmick $1,000.00 for the rights to sex.com. (Wagstaffe Decl., Ex. E, Cohen Depo. At 650-652.)] There is, however, no record of such payment and the Dimmick letter notably omits any reference to such or any consideration for the transfer.

According to the foregoing, Plaintiff seeks summary adjudication of its motion for declaratory relief. Specifically, Plaintiff asks the Court to determine who owns the domain name "sex.com"[6] and to find that Defendants' claims and defenses for trademark infringement are meritless.

III. LEGAL STANDARD

Summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 247-248 (1986). The standard applied to a motion seeking summary judgment is identical to the standard applied to a motion seeking summary judgment of the entire case. *Urantia Foundation v. Maaherra*, 895 F Supp 1335, (D. Ariz. 1995). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex v. Catrett*, 477 US 317, 323, (1986) (citations omitted). If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 US at 324. The facts brought forth must be material, *i.e.*, "facts that might affect the outcome of the suit under the governing law . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 US at 247-248.

It is the court's responsibility "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F2d 626, 631 (9th Cir 1987). A genuine material issue for trial exists, if the non-moving party presents evidence from which a reasonably jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Id.* at 248-249; *Barlow v. Ground*, 943 F2d 1132, 1134-1135 (9th Cir 1991). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 US 574, 587 (1986).

IV. DISCUSSION

A. Declaratory Relief

The central questions before the Court are 1) whether the Dimmick letter was forged; 2) what is the effect of a transfer of a property interest effectuated by a forged document; and 3) what is the proper remedy for such a transfer?

A forgery is a "writing which falsely purports to be the writing of another." *Generes v. Justice Ct.*, 106 Cal. App. 3d 678, 682 (1980); *Wutzke v. Bill Reid Painting Service, Inc.*, 151 Cal. App. 3d 36, 40-44 (1984). De-

[6] Network Solutions, Inc. has already deposited the domain name "sex.com" within the Court's jurisdiction and has authorized such a transfer back to Kremen if the Court should so order. (Ellen Gutowski Declaration, attached as Exhibit F to James W. Wagstaffe's Supplemental Declaration.)

fendants assert that "[p]laintiff has not sustained his burden of even establishing that the Dimmick letter is a fraud." (Defendants' Opposition at 39:9-10.) Defendants support this argument by attacking Dimmick's credibility. Specifically, they accuse Dimmick of "[l]ying under oath about delivering documents proving that someone she knew actually signed [the Dimmick letter]." (*Id.* at 39:10-11.) Defendants' attack on Dimmick is unwarranted and provides no defense. While there is no evidence that Dimmick lied under oath, (*Id.*), such attacks on Dimmick's credibility do not even create a triable issue of fact. *Crawford-El v. Britton*, 523 US 574 (1998); *Canada v. Blain's Helicopters, Inc.*, 831 F2d 920, 925 (9th Cir 1987). Accordingly, and based on the undisputed facts, the Court finds that the October 15, 1995 Dimmick letter, which purported to transfer the "sex.com" domain name from Gary Kremen to Stephen Michael Cohen, is a forgery.[7]

"It has been uniformly established that a forged document is void *ab initio* and constitutes a nullity; as such it cannot provide the basis for superior title as against the original [owner]." *Wutzke*, 151 Cal. App. 3d at 40-44. In *Wutzke*, the Court indicated that "there is no reason in law or policy why the principle that forged documents are void should not apply to an instrument through which an interest in property is passed." *Id.* at 43-44. Defendants do not appear to dispute the application of this principle to the transfer of domain names nor do they dispute the application of this principle to the Dimmick letter.

Defendants relying on *Kremen v. Cohen*, 99 F Supp 2d 1169 *[5 ILR (P&F) 435]* (ND Cal. 2000), do argue in their cross-motion for summary judgment that a domain names is not a form of intangible personal property. This argument, however, is without merit as this Court has already recognized that a domain name is a form of intangible property. *Kremen*, 99 F Supp 2d at 1173 ("NSI contends that a domain name is a form of intangible property . . . The Court concurs."); *see also*, Cal. Civ. Code §§655, 654; *Yuba River Power Co. v. Nevada Irrigation Dist.*, 207 Cal. 521, 523 (1929) (stating that property includes "everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value."); *McCord v. Plotnick*, 108 Cal. App. 2d 392, 395 (1952) ("In a court of equity 'if that which complainant has acquired fairly at substantial cost may be soled fairly at substantial profit, a competitor who is misappropriating it for the purposes of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property.")

The Court therefore finds that this principle which establishes that a forged document is void *ab initio* and constitutes a nullity to the transfer of domain names just as with other interests in property. In this case, Cohen's claim to title to the "sex.com" domain name depends solely on the forged Dimmick letter. Accordingly, the Court finds that the transfer of the domain name "sex.com" from Kremen to Cohen was void *ab initio* and constitutes a nullity. As for subsequent transfers among the Defendants, the Court finds that they are similarly void. "Title, like a stream, cannot rise higher than its source. No one can, therefore, transfer a better title than he has." *Barthelmess v. Cavalier*, 2 Cal. App. 2d 477, 487-488 (1934); *see also Wutzke*, 151 Cal. Appl 3d at 44; *Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co.*, 218 Cal. App. 3d 1354, 1361 (1990).

The proper remedy for such an invalid transfer is to return to the parties to the position that they were before the transfer. *Reay v. Reay*, 97 Cal. App. 264, 277 (1929) ("Assuming that the transaction should not have taken place the court proceeds as though it had not taken place, and returns the parties to that situation."). Again, Defendants do not challenge the application of this legal principle to the instant case. Rather, Defendants argue that the status quo prior to the transfer was that Kremen was not the owner of the "sex.com" domain name as it was registered to OCI.[8] Defendants

[7] Defendants also assert that the alleged "apparent authority given Ms. Dimmick (or whoever resided in the office of Online Classifieds, Inc. at 242 Cole St.) preclude[s] Kremen from disputing the conveyance by Dimmick." (Defendants' Opposition at 40-1-4.) Neither the record nor the law, however, support Cohen's assertion. First of all, "[o]stensible authority is not established by the statements and representations of the agent. It created only by the acts or declarations of the principle." *People v. Surety Ins. Co.*, 136 Cal. App. 3d 556, 562 (1982). That is, "apparent authority is created, and its scope defined, by the acts of the principle in placing the agent in such a position that he appears to have the authority which he claims or exercises." *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 406 (1985). There is no admissible evidence which shows that Kremen, the principle, cloaked or vested Dimmick (or any other such individual) with the apparent authority to act on his behalf.

[8] Defendants also argue that there is a triable issue of fact as to whether OCI was Kremen's sole proprietorship. Defendants, though, fail to offer admissible evidence which shows that OCI was anything other than Kremen's fictitious business name. Alternatively, Defendants contend that Electric Classifieds, Inc., or Online Classifieds, Inc. (which was incorporated in 1998) possess an ownership interest in the domain name "sex.com." The record is devoid, though, of any admissible evidence which shows that anyone other than Kremen and his dba OCI possess an ownership interest in the domain name "sex.com." While Online Classifieds Inc. did change its name to Electric Classifieds, Inc. in the summer of 1994, ECI has repeatedly denied any ownership interest in "sex.com."

assertion though, at a minimum, requires returning the registration of the domain name to how it existed before the invalid October 1995 transfer—with Kremen as the administrative, technical and zone contact and with OCI (Kremen's dba) as the "organization" on whose behalf Kremen registered the domain name. However, as there is no distinction between Kremen and his fictitious business entity (OCI) Kremen is the rightful owner of "sex.com." *Pinkerton's Inc. v. Superior Court (Schrieber)*, 49 Cal. App. 4th 1342, 1348 ("Doing business under another name does not create an entity distinct from the person operating the business. The business is a fiction, and so too is any implication that the business is a legal entity separate from its owner."); *see also, Seidl v. Greentree Mortgage Co.*, 30 F Supp 2d 1292, 1300 (D Colo. 1998) (individual had standing to sue corporation that improperly used the internet domain name registered by his dba).[9] Accordingly, Kremen is entitled to restoration of the "sex.com" domain name registration.

B. Trademark Infringement

Defendants assert that Plaintiff cannot use the domain name "sex.com" because it would violate their trademark rights to the term sex.com.[10] To establish a claim for trademark infringement, a mark holder must prove "(1) ownership of a valid mark, (2) use by the defendant of the same or similar mark, and (3) that there is a likelihood of confusion." *Alchemy II, Inc. v. Yes! Entertainment Corp.*, 844 F Supp 560, 569 (CD Cal. 1994). If the mark at issue is not federally registered, the party asserting that the mark is valid has the burden of proving that it is protectible. *Filipino Yellow Pages, Inc. v. Asian Journal Publication, Inc.*, 198 F3d 1143, 1146 (9th Cir 1999). Hence, because Defendants concede "sex.com" is not federally registered they have the initial burden of establishing that "sex.com" is protectible. Plaintiff asserts that the term "sex.com" is generic and therefore unprotectible. *Id.* (where the allegedly infringing party asserts genericness as a defense the party claiming trademark infringement has the burden of proving nongenericness). "If the term is generic, it cannot be the subject of trademark protection under any circumstances, even with a showing of secondary meaning." *Id.*

"Sex" and "sex.com" are generic terms, and, as such, cannot be registered as trademarks.[11] "Generic terms are those used by the public to refer generally to the product rather than a particular brand of product." *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F3d 1036, 1058 n. 19 *[2 ILR (P&F) 492]* (9th Cir 1999) (citations omitted); *see also, Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 US 189, 194 ("A generic term is one that refers to the genus of which the particular product is a species.")

Under the Ninth Circuit's "who-are-you/what-are-you test," a term is generic if it fails to answer the question "Who are you?" *Filipino Yellow Pages, Inc.*, 198 F3d at 1147. Neither "sex" nor "sex.com" answers the question "Who are you?" These terms, "sex" and "sex.com," do not reveal anything about "who" runs the website "sex.com" or "where" it comes from, or "who vouches" for it. *Filipino Yellow Pages, Inc.*, 198 F3d at

(Declaration of Kevin Kunzleman, ¶¶5, 7, attached as Ex. H. to Wagstaffe's Supplemental Declaration; ECI Declaration attached as Exhibit G to Wagstaffe's Reply Declaration to Defendants Cross Motion for Summary Judgment). In addition, on Cohen's motion to dismiss, this Court agreed that Online Classifieds, Inc., the Delaware corporation (as opposed to Kremen's dba), is not the owner of the "sex.com" domain name. *See* March 22, 1999 Order.

[9] In addition, in their Cross-Motion for Summary Judgment Defendants' argue that under California Business & Professions Code §17918 both Kremen's use of a dba without filing a fictitious business name statement and his use of the word "Inc." in his fictitious name preclude him from maintaining this action. However, Kremen's failure to register his fictitious name and his inclusion of the word "Inc." does not invalidate Kremen's ownership of "sex.com" nor does it prevent him from advancing the instant causes of action. *See, e.g., Hydrotech Sys., Ltd. v. Oasis Waterpark*, 52 Cal. 3d 988, 1001 n. 8 (1991). Indeed, disallowing Kremen's claims under Cohen's reading of §17918 would ignore the central purpose of the statute, as "[t]he statute's purpose is not served by extending its protection to one who has committed a tort against a fictitiously named business." *Id.*

[10] While the Court will assess Defendants' argument on the merits, it notes that owning a trademark would not justify the misappropriation of another entity's registered domain name. "The law does not condone 'self-help' for the victim of one wrong in the form of his commission of another legal violation of his own." *Horn Abbott Ltd. v. Sarsaparilla Ltd.*, 601 F Supp 360, 370 (ND Ill. 1984).

[11] The domain name "sex.com" is comprised of a top-level domain name (.com) and a second level domain name ("sex"). Courts have held that the ".com" suffix is not a relevant part of a claimed trademark because it is a generic locator for domain name web sites dedicated to commercial use. *See, e.g., Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F3d 1036, 1055 *[2 ILR (P&F) 492]* (9th Cir 1999); *Northern Light Technology v. Northern Lights Club*, 97 F Supp 2d 96, 110 *[5 ILR (P&F) 191]* (D Mass. 2000); *CCBN.com, Inc. v. c-call.com, Inc.*, 73 F Supp 2d 106, 112 *[4 ILR (P&F) 340]* (D Mass. 1999). Cohen, however, contends that he has used the term "sex.com" in his French Connection Electronic Bulletin Board since 1979. Cohen's claim is questionable as the "dot-com" nomenclature was not recognized until 1984. Moreover, if Cohen claims superior right to the trademark "sex.com," presumably his domain name would be "sex.com.com." Nonetheless, the Court concludes that the term "sex.com," like "sex," is generic.

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1147. The primary significance of these terms is to describe the type of product offered rather than the producer (*i.e.*, Ynata, Ltd.), and therefore "sex" and "sex.com" are, by definition, generic. *Id.* at 1147; *New Kids on The Block v. New America Publ'g., Inc.*, 971 F2d 302, 306 (9th Cir 1992). It does not appear that Defendants have offered evidence of nongenericness sufficient to overcome their burden of proof.

Defendants, however, argue that "sex.com" is a valid descriptive trademark because it has acquired secondary meaning. Even assuming that the term "sex.com" is not generic the term is "perilously close to the 'generic' line." *Filipino Yellow Pages, Inc.*, 198 F3d at 1151 (citation omitted). "Such a weak descriptive mark could be a valid trademark only with a strong showing of strong secondary meaning." *Id.* "The burden of proving secondary meaning is on the party asserting it." *Yamaha Int'l Corp. v. Hashino Gakki Co.*, 840 F2d 1572, 1578-1579 (Fed. Cir. 1988).

"Secondary meaning has been defined as association, nothing more. The basic element of secondary meaning has been defined as association by a substantial segment of consumers and potential customers 'between the alleged mark and a single source of the product.' " *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F2d 1352, 1354 (9th Cir 1985) (en banc) (internal citations omitted). To establish that a descriptive term has secondary meaning, defendants "must show that primary significance of the term in the minds of the consuming public is not the product but the producer." *Kellog Co. v. National Biscuit Co.*, 305 US 111, 118 (1938); *see also, Transgo Inc. v. Ajac Transmission Part Corp.*, 768 F2d 1001, 1015 (9th Cir 1984).

Thus, to avoid summary judgment Defendants must show that a substantial number of sex.com's customers or potential customers associate the term "sex.com" with the services provided by Defendants. The only evidence of secondary meaning offered by Defendants is declarations from thirteen individuals who claim to have used the French Connection Bulletin Board System for various lengths of time since the late 1970s, and who claim that the term "sex.com" was part of the bulletin board. These declarations do not show any secondary meaning of association of the term "sex.com" with Defendants' products. Moreover, these declarations on their own are insufficient to show that such secondary meaning was held by a "substantial number" of Defendants' customers and potential customers (those who consume internet pornography).[12] Defendants do not even show that consumers of pornography associate particular images available at their site with a particular producer. In sum, Defendants fail to establish secondary meaning for "sex.com."

Accordingly, "sex.com," even if descriptive rather than generic, is not a valid and protectible trademark, with respect to a web site delivering pornography to the internet community. Hence, Defendants claim to superior trademark right fails as a matter of law.

V. CONCLUSION

Based on the foregoing it is hereby ordered that:

(1) Plaintiff Gary Kremen's Motion for Summary Adjudication on Claims for Declaratory Relief is granted;

(2) Network Solutions, Inc., shall restore registration of the "sex.com" domain name to Gary Kremen; and

(3) Plaintiff's partial summary judgment motion with respect to Defendants' trademark claims is granted.

IT IS SO ORDERED.

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[12] Significantly, the Ninth Circuit has noted that "[t]rademark law is skeptical of the ability of an associate of a trademark holder to transcend personal biases to give an impartial account of the value of the holder's mark" and that testimony from such people has little probative value. *Self Realization Fellowship Church v. Ananda Church of Sel-Realization*, 59 F3d 902, 910, 912 (9th Cir 1995). The most persuasive method of proving secondary meaning is through a scientific survey of the irrelevant market. *Vision Sports, Inc. v. Melville Corp*, 888 F2d 609, 615 (9th Cir 1995).